ORIGINAL

No. 87-1518

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF FLORIDA,

Petitioner,

v.

FLOYD MORGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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May 9, 1988

QUESTION PRESENTED

Whether the State of Florida can claim the protection of the Fourteenth Amendment due process clause against action by the Supreme Court of Florida.

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STATEMENT OF THE CASE

At the penalty phase of Floyd Morgan's 1978 murder trial, the Florida trial judge instructed the advisory jury that the mitigating circumstances it could consider in deciding whether to recommend death or life imprisonment "shall be" the seven circumstances specified in Fla. Stat. § 921.141(6) (1977) (amended 1985). The jury recommended death by a 7-5 vote. The trial court adopted the jury's recommendation, making clear that

its consideration of mitigating circumstances was limited to those specified in § 921.141(6). Pet. App. A-4.[1/]

Following an unsuccessful appeal,[2/] Morgan filed a motion for post-conviction relief in Florida state court pursuant to Fla. R. Crim. P. 3.850. At the evidentiary hearing on his motion,[3/] Morgan introduced substantial evidence of mitigating circumstances that could have been presented to the trial court at the guilt phase of Morgan's trial.

The trial court denied Morgan's motion, and Morgan appealed to the Supreme Court of Florida. Morgan's brief on appeal argued in part that the trial court's refusal to consider nonstatutory mitigating circumstances required resentencing:

> If this Court does not conclude that Morgan's counsel rendered constitutionally ineffective assistance of counsel at the penalty phase of Morgan's trial . . . it should order new sentencing proceedings on the ground that Morgan was denied the opportunity to present evidence of nonstatutory mitigating circumstances at his trial in 1978. This Court has recently decided that an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute [Fla. Stat. § 921.141] in determining whether to impose a sentence of death or life imprisonment. Harvard v. State, 486 So. 2d 537 (Fla. 1986).

1/ The appendix to the petition for certiorari will be cited as "Pet. App." The petition itself will be cited as "Pet."

2/ Morgan v. State, 415 So. 2d 6 (Fla.), cert. denied, 459 U.S. 1055 (1982).

3/ The trial court initially denied the motion without a hearing. The Supreme Court of Florida reversed the trial court's decision and remanded for an evidentiary hearing. Morgan v. State, 475 So. 2d 681 (Fla. 1985). Inexplicably, the State cites this ruling in Morgan's favor for the proposition that Morgan's "first petition was denied as facially deficient." Pet. 4.

Initial Brief of Defendant/Appellant Floyd Morgan, at 49 n.19. The State chose not to address this contention in its opposing brief.[4/]

Several months after Morgan filed his final brief in the Supreme Court of Florida, but before oral argument, this Court decided Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).[5/] In Hitchcock, the Court reversed the denial of a writ of habeas corpus where a Florida trial judge had instructed the advisory jury that the jury's consideration of mitigating circumstances was limited to the seven circumstances specified in Fla. Stat. § 921.141, and had refused to consider nonstatutory mitigating circumstances in acting on the jury's recommendation of death. See 107 S. Ct. at 1824.

Counsel for both parties devoted considerable attention to Hitchcock in oral argument before the Supreme Court of Florida. Morgan's counsel, building upon the argument in Morgan's initial brief, contended that Hitchcock and McCrae v. State, 510 So. 2d 874 (Fla. 1987),[6/] required that the Rule 3.850 motion be granted and the case remanded for resentencing.

4/ The State did note in its brief that it "rejects each and every contention of the defense. If some obscure point is not specifically denied, or contested, elsewhere in this brief it is rejected here." Answer Brief of Appellee, at 12.

5/ Morgan filed his reply brief on December 19, 1986. Hitchcock was decided April 22, 1987. Oral argument on Morgan's appeal was held before the Supreme Court of Florida on June 30, 1987.

6/ In McCrae, decided shortly before the oral argument in Morgan's case, the Supreme Court of Florida vacated a death sentence on the basis of this Court's decision in Hitchcock.

Counsel pointed out that the jury instructions found unconstitutional in Hitchcock were virtually identical to those given at the penalty phase of Morgan's trial.[7/]

In response to questions from the court, counsel for the State devoted more than four minutes of his argument to Hitchcock and the issue of nonstatutory mitigating circumstances.[8/] Although the State conceded that the jury instructions rejected in Hitchcock were indistinguishable from those given at Morgan's sentencing trial, it nevertheless argued at length that Hitchcock did not control Morgan's case. Despite the State's offer to submit a supplemental brief on a Florida case addressing the nonstatutory mitigating circumstances issue, it never did so.

The Supreme Court of Florida held unanimously that Morgan was entitled to resentencing under Hitchcock. Morgan v. State, 515 So. 2d 975 (Fla. 1987) (per curiam), reprinted at Pet. App. A-1 to A-7. The State moved for rehearing on the grounds, inter alia, that Morgan had not raised the Hitchcock argument before the Supreme Court of Florida and that Hitchcock did not control Morgan's case. In response to the State's motion, Morgan pointed out that he had raised the Hitchcock issue in his initial brief and that both sides had discussed Hitchcock in detail during oral argument. The Supreme Court of Florida denied the State's motion for rehearing. Pet. App. A-9.

7/ Morgan has lodged with this Court a copy of the Florida Supreme Court tape recording of the oral argument in this case. The discussion of Hitchcock occurs approximately midway through the opening argument of Morgan's counsel.

8/ See supra note 7. The discussion of Hitchcock by counsel for the State occurs at the beginning of his argument.

REASONS FOR DENYING THE WRIT

As the State acknowledges in its petition, Pet. 10, the decision of the Supreme Court of Florida does not conflict with the decision of any other state or federal court. Nor does the petition present any significant unsettled issue deserving of this Court's attention. Even if the State's factual claims were correct--which they are not--the State's assertion that the action of its own Supreme Court deprives the State of a protected interest[9/] without due process of law simply ignores the well-settled principle that a state is not a "person" entitled to the protection of the Fourteenth Amendment.

I. THE STATE HAD AN AMPLE OPPORTUNITY TO ADDRESS THE HITCHCOCK ISSUE BEFORE THE SUPREME COURT OF FLORIDA.

The State's claim that it was denied due process rests upon its erroneous assertion that "[b]riefs were filed by the parties and oral argument was held [in the Supreme Court of Florida] on the single issue of ineffective assistance of counsel." Pet. 5. In fact, Morgan argued in his initial brief to the Supreme Court of Florida that the trial court had improperly refused to consider nonstatutory mitigating circumstances, and both Morgan and the State addressed Hitchcock during oral argument. Indeed, the State alone devoted more than four minutes of its argument to the Hitchcock issue. The State addressed Hitchcock again in its unsuccessful motion for rehearing. Thus, the State misstates the record when it claims that the Supreme

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9/ The State does not specify in its petition exactly what the Supreme Court of Florida deprived the State of--life, liberty, or property. Clearly, the action of the Supreme Court did not deprive the State of "life"; similarly, it is difficult to see that the State has lost "property" through its inability to execute Morgan. Perhaps Florida is contending that the action of the Supreme Court of Florida deprived the State of a previously unrecognized liberty interest in executing its citizens.

Court of Florida "refused to permit the State to be heard, orally or in writing," on the Hitchcock issue. Pet. 6. The issue was squarely presented to the court and addressed by the parties.

II. THE STATE OF FLORIDA IS NOT A "PERSON" ENTITLED TO CLAIM THE PROTECTION OF THE FOURTEENTH AMENDMENT.

Apart from the erroneous factual assertions that underlie the State's claim, its legal position is without merit. It is well-settled that the State of Florida is not a "person" entitled to claim the protection of the Fourteenth Amendment.

Sixty-five years ago this Court held that a political subdivision of a state could not claim the protection of the Fourteenth Amendment against that state. City of Trenton v. New Jersey, 262 U.S. 182, 190-92 (1923). Ten years later, the Court reaffirmed this principle. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933). Since these two decisions, federal and state courts have uniformly held that a state is not a "person" entitled to claim the protection of the Fourteenth Amendment. See, e.g., Pennsylvania v. Porter, 659 F.2d 306, 314 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982); Wisconsin v. Zimmerman, 205 F. Supp. 673, 675 (W.D. Wis. 1962); State ex rel. New Mexico State Highway Commission v. Taira, 78 N.M. 276, 430 P.2d 773, 778 (1967).

These decisions accord with the purpose of the Fourteenth Amendment. That Amendment was intended to protect the individual, not the state. See Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976) (equal protection clause of the Fourteenth Amendment "protect[s] people, not States"); Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (Fourteenth Amendment creates "personal rights" against state action). The Fourteenth Amendment was not intended to regulate disputes between one branch of a state's government and another branch. Cf. Highland Dairy Farms v.

Agnew, 300 U.S. 598, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). If the executive branch of Florida has a dispute with the judicial branch of Florida over whether correct state procedures were followed, that is a matter to be resolved by the state government of Florida, not by this or any other federal court.[10/]

The State of Florida, under well-established law, is not a "person" entitled to the protection of the Fourteenth Amendment. Florida's claim to the contrary is not worthy of consideration by this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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10/ The State's reliance on the Tenth Amendment, Pet. 12, is particularly odd. The Tenth Amendment may or may not limit the extent to which the federal government can regulate the affairs of state government, e.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), but it clearly does not empower the federal government to undertake such regulation.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May 1988 I caused the foregoing Respondent's Brief in Opposition to be served by first-class mail, postage prepaid, upon the following: Mark C. Menser, Esquire, Assistant Attorney General, Dept. of Legal Affairs, The Capitol, Tallahassee, Florida 32399.

Robert L. Weinberg